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ABSTRACT

There is a growing perception, particularly among Hispanics, of the urgent need to structure a coherent national policy encompassing the rights of language minorities. No such policy can be framed without taking into consideration the unique situation of Puerto Ricans, who are American citizens by birth but who are taught in Spanish in Puerto Rican schools with congressional acquiescence. A review of court decisions, statutes, and agency rules shows some important advances: the bilingual provision of the Voting Rights Act, bilingual education, some requirements for bilingual notices and assistance in unemployment and public assistance matters, and some limitations on an employer's right to establish and enforce English-only rules on the job. These rights, however, do not stand on a secure foundation. Unless a national language policy is put in place, private employers and government agencies will continue to implement disjointed and sometimes conflicting policies. (CMG)

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UNITED STATES LANGUAGE POLICY: WHERE DO WE GO FROM HERE?

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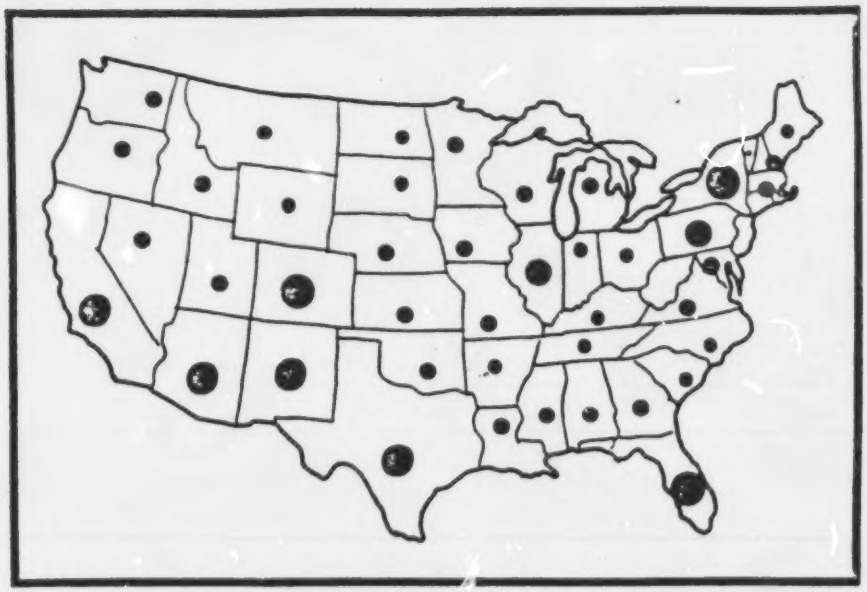

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ABSTRACT

The United States lacks an "official" language designation. When confronted with the issue, the Founding Fathers, in their wisdom, opted against it. Thus, the Framers of the Constitution elected to set the debate squarely in the political domain. This matter is fast becoming one of the hottest issues of the 1980s.

While English is currently the common language, this does not preclude the "official" use of others. Millions of students have a right to the benefits of bilingual education. Adults also have the right by Federal law to language assistance in some cases. Nonetheless, this extant patch-work of disjointed, sometimes conflicting court decisions, agency rules, legislative enactments, general practices and usages have not coalesced into general policy.

Language policy may differ for adults as opposed to children. While bilingual education may become accepted, particularly for non-English speaking children, numerous children, who are dominant in English and are bilingual, are not reached by this approach. Those children, like adults, are meeting resistance when they attempt to gain the benefits of bilingual assistance in public schools.

Bilingualism as a policy affecting adults in diverse public entitlements, such as public assistance and unemployment compensation, may be more difficult to establish. In the workplace, English-only policies may be implemented, particularly when the Hispanic work force increases. Such rules may be subject to attack, but the outcome remains unclear at this point.

The language policy of the United States, presently in an inchoate state, will likely be firmly established by the end of the decade. Hispanics are called upon to play a historic and paramount role in its development. The test by fire may well be the use of Spanish at the workplace.

Consideration of the unique and peculiar situation of Puerto Ricans in a sine qua non of the framing of any possible language policy. Along with an analysis of court decisions, statutes, and agency rules, a review of the language policy of the United States in Puerto Rico is key, because Puerto Ricans are U.S. Citizens by birth.

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PREFACE

The nature of this presentation differs much from that of most presentations being delivered at the Symposium. Because the authors are lawyers, it is cast for the most part in the style of legal analysis. Within that context, it is limited by the focus of the Symposium to the national language policy vis a vis Spanish. While Spanish is the second most commonly used language in the United States, and its impact upon national policy (and the converse) is paramount, a complete analysis would require treatment of the Hawaiian and Filipino experiences, those of Native Americans generally, and of the various other linguistic minorities. We leave to others, or for another time, a fuller analysis of this topic.

It is relevant to explain what is meant by such terms as "official" and "common" language. The latter term, generally, could be defined as that language which has become popular throughout a given region and which is used generally in all forms of interaction. The measure of commonality is basically the extent of its use, and the recognition it is given by speakers as a standard for communication. It could also be called "prevalent" or "standard" language. By "official" is meant that language or languages that have received governmental recognition as the authoritative language or languages, usually through some constitutional or similar document. While there can technically be no limit to the number of "official" languages of a given country, the number of "common" languages is limited ultimately by their usage. It is possible to have an "official" language that is not generally used by most people, and similarly it is possible for there to be a "common" language that receives no "official" recognition. In the United States there are areas in which Spanish is the "common" language. The time may soon come in which Spanish will stand next to English as this country's second "common" language.

The United States does not have an "official" language policy. When the Founding Fathers confronted this issue, they chose not to designate English as the official language.[1] In fact, there were more than a handful of influential citizens opposed to anything and everything English. They would have preferred French or even German as the language of the fledgling nation. Perhaps as the result of a stalemate or the simple lack of a consensus, the Framers of the Constitution omitted from that document any reference to an "official" language. Let's not forget that many of these men could speak more than one language with equal fluency and were not wed particularly to any one of them. Now, almost two centuries after the Constitution became the supreme law of this land, the debate over an official language has been rekindled. This issue is potentially one of the hottest of the 80's.

Both political and legal history suggest that designation of an official language would be more divisive than ameliorating. From its very inception the United States has been a nation of nations. Many immigrant groups have arrived, together with their worldly possessions, bringing with them their world views, mores, and languages.

Tolerance for the use of different languages in the United States was greater in the 19th Century than the present one. In fact, both French and German were languages

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[1] See, generally, Leibowitz, A.H., The Bilingual Education Act: A Legislative Analysis, National Clearinghouse for Bilingual Education, 1980, at page 3.

of instruction in various parts of the country during the second half of the nineteenth century.[2] Former Mexican citizens, in territories taken over by the United States, retained the right to preserve their native language and culture in both private and public spheres under the Treaty of Guadalupe-Hidalgo, in 1848, which ended open hostilities between the neighbors North and South of the Rio Bravo. To this day Hispanics, because of historical circumstances, are recognized as having a claim to the right to retain their language and culture:

> [For immigrant groups other than Hispanics, the] decision to come here carried with it a willingness to give up their language, everything.
>
> That wasn't true in the Southwest. We went in and took the people over, took over the land and culture. They had our culture superimposed on them. They did not consent to abandon their homeland and to come here and learn anew. They are not only the far more numerous group, but we recognize the fact that they are entitled to special consideration.[3]

Perhaps no group "willingly" gives up its language. In the case of Hispanics, moreover, there is all the more reason to retain the Spanish language by virtue of our proximity to our homelands. Today, as a result of advances

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[2] United States Commission for Civil Rights, A Better Chance To Learn: Bilingual-Bicultural Education, May, 1975.

[3] Statement of Senator Yarborough, (D-Texas), Hearings Before the Senate Special Subcommittee on Bilingual Education of the Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 37 (1967).

in technology, including modern transportation, we enjoy the benefits of maintaining stronger ties to our homelands than was the case with European and Asian immigrants in an earlier era. The strongest case, perhaps, can be made for Puerto Ricans.

Puerto Rico, a Spanish colony since the conquistadores arrived in the late 1400s, together with Cuba formed the last vestige of Spain's empire in the Western Hemisphere. Acquired by the United States after its invasion in 1898 during the Cuban-Spanish-American War, Puerto Rico continues to be a possession of the United States.

At the outset it was the policy of the United States Congress (which, under the U.S. Constitution's Territorial Clause, has jurisdiction and control over Puerto Rico) to "americanize" the Island's people. The principal tool in this process was the public education system.

For decades the President of the United States appointed not only the Governor of Puerto Rico, but its Commissioner of Education as well. This helps to gauge the key nature of this position in the eyes of the United States. At different points during the course of almost fifty years, the several Commissioners of Education required that all, or, at the very least, the first four years of elementary instruction be conducted in English. But in high schools, from 1900 through 1949, <u>all</u> instruction was in English. Since then, however, and during the entire period of the existence of the Commonwealth status of Puerto Rico,

education at all levels has been taking place in Spanish.[4]

IMPACT OF THE POLITICAL STATUS OF PUERTO RICO

Different courts have over the years taken note of the fact that Spanish is the language of Puerto Rico, and the fact that it is so with Congress's acquiescence. Some of the court opinions about to be cited are either dissenting opinions or opinions of lower courts whose language were not adopted by the reviewing court of appeals. However, they clearly provide an underlying rationale for the argument that because Puerto Ricans are American citizens, yet do not have to be fluent in English, Spanish is a quasi-official language, or at least that Puerto Ricans have a claim to special consideration.[5]

Chief Justice Wilentz, of the New Jersey Supreme Court, in a dissenting opinion, recognized the effect that the political relationship between the Island and the United States has on language policy. He disagreed with his brethren who held that in New Jersey due process of law does not require that non-English speaking Hispanics receive

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[4] For a more detailed exposition of the language policy in Puerto Rico's public schools, see, Osuna, J.J., A History of Education in Puerto Rico, Editorial de la Universidad de Puerto Rico, 1949 Ed., pages 341-418.

[5] As declared by the Supreme Court of the United States: "Puerto Rico occupies a relationship to the United States that has no parallel in our history." Examining Board v. Flores de Otero, 426 U.S. 572, 596 (1976).

notices in Spanish when applying for unemployment compensation:

> [T]here are special considerations of fairness to be accorded Spanish-speaking persons. Spanish, unlike any other language, has quasi-official status in the United States because of our relationship to the Commonwealth of Puerto Rico. Puerto Ricans are United States citizens with the same responsibilities and benefits of other United States citizens, but schools in Puerto Rico are conducted in Spanish. Thus, unlike non-English speaking immigrants from foreign countries, non-English speaking Puerto Ricans are not required to learn English before they may excercise their right to vote as United States citizens. Spanish is thereby given special recognition as the native language of many United States citizens.[6]

In Katzenbach v. Morgan,[7] the Supreme Court, speculating on possible congressional rationales for limiting §4(e) of the Voting Rights Act of 1965[8] to

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[6] Alfonso v. Board of Review, Department of Labor and Industry, State of New Jersey, 89 N.J. 41, Supreme Court of New Jersey, A-37, September Term, 1981; slip. op. at pages 16-17 (Wilentz, C.J., disenting).

[7] 384 U.S. 641 (1966).

[8] 42 U.S.C. § 1973 (e) (2); Voting Rights Act of 1965, Sections 1 et seq., 4 (e) (2).

citizens educated in "American-flag" schools (i.e., Puerto Rico), had cited:

> a recognization of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico, an awareness of the Federal Government's acceptance of the desirability of Spanish as the language of instruction in Commonwealth schools, and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States.[9]

In Puerto Rican Organization for Political Action (PROPA) v. Kusper, the United States Court of Appeals for the Seventh Circuit explained:

> United States policy towards persons born in Puerto Rico is to make them U.S. citizens, to allow them to conduct their schools in Spanish, and to permit them unrestricted migration to the mainland. As a result, thousands of Puerto Ricans have come to live in New York, Chicago, and other urban areas; they are eligible, as residents and U.S. residents, to vote in elections conducted in a language many of them do not understand. Puerto Ricans are not required, as are immigrants from foreign countries, to learn English before they may exercise their right to vote as United States citizens.[10]

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[9] 384 U.S. at 658 (footnotes omitted).

[10] 490 F.2d 575, 578 (7th Cir.1973) (footnotes omitted).

The now much-neglected case of United States v. County Board of Elections of Monroe County, N.Y. [11] upheld federal law against New York State's attempt to deny Puerto Ricans the right to vote. In this case the federal government went to court to protect a 21-year old Puerto Rican woman who had completed the ninth grade in the Commonwealth of Puerto Rico. She was not allowed to register to vote at a Rochester, New York, polling place, because she could neither read nor write the English language to the satisfaction of the state election officials.

The three-judge court upheld the federal government's position on behalf of the woman. It eloquently traced the history of Puerto Rico's relationship to the United States to justify its decision. It stated:

> Indeed, by means of this all pervasive Article IV power [in the United States Constitution to dispose of and make all needful rules and regulations respecting the territory or other property belong to the United States], Congress controlled the very structure and existence of Puerto Rican life and, for over half-century, effectively shaped its institutions in accordance with Congress' own territorial policies. But throughout most of this period, Congress, cognizant of evolving principles of international law, recognized the inherent right of a people and the wisdom of a foreign policy which sought to preserve the territory's culture and the integrity of its mother tongue. ...

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[11] 248 F.Supp. 316 (W.D.N.Y., 1965) (three-judge Court).

> While, in the earliest years of the territorial administration the Commissioners [of Education appointed by the President of the United States] decided that the English language would be the medium of instruction in these schools, it was soon apparent that the attempt to "Americanize" the inhabitants of the newly acquired territory by the artifical introduction of a foreign language into its educational processes was not only impracticable but disadvantageous to this country's relation with other Latin American nations.[12]

The 1978 amendments to the federal Bilingual Education Act made a special provision with respect to children in Puerto Rico. The 1974 Act permitted the Commonwealth of Puerto Rico, like local agencies in the United States, to improve the English proficiency of children residing in the Island. The 1978 amendments provided that Puerto Rico could serve the needs of students with limited proficiency in Spanish! The amendment was designed to assist children who return to Puerto Rico from the States, and are unable to function adequately in Spanish, the language of instruction. Thus
the Congress again recognized the singular nature of Puerto Rican American citizens, and also its responsibility to preserve the native language of Puerto Rico.

What applies to Puerto Ricans as a discrete and insular minority by law should also apply to all Hispanics

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[12] Id., at 319.

generally, in light of previously mentioned conditions of proximity, population shift, and politics. The Spanish language ties us all together, and the benefits derived by Puerto Ricans as a result of our peculiar status are shared by all Spanish speakers. Puerto Ricans, therefore, can become the cutting edge, the vanguard in the struggle for the adoption of a new language policy in the United States.

While previous immigrant groups were of diverse cultural and linguistic backgrounds, Hispanics speak the same language and maintain ties among themselves premised, in large part, on sharing a common cultural heritage. This bond among Latinos exists despite national frontiers, regional conflicts, and a variety of ethnic admixtures. In the United States Latinos are generally drawn to each other more than to non-Latinos. For instance, although Puerto Rican intermarriage with non-Puerto Ricans has increased over the years, it has been mostly with other Latinos.[13]

However, no matter what justifications have been put forth for bilingualism, the English language has enjoyed primacy in the fields of politics and government, commerce and industry, and social intercourse generally. English is today, as it has been in the past, the common language of this land. But, it is nowhere etched in stone that English shall forevermore enjoy such a singular status. Demographic

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[13] See, Fitzpatrick, J.P., and Gurak, D., Hispanic Intermarriage in New York City: 1975; Hispanic Research Center, Fordham University, New York, 1979.

shifts may cause an eventual modification of the monolingualism advocated by, among others, former U.S. Senator S.I. Hayakawa and the President of the American Federation of Teachers, Albert Shanker.

LANGUAGE POLICY AND CHILDREN

English language proficiency is recognized by Hispanics as a necessary requirement for interaction with the larger social body. It is for this reason that Hispanic parents have struggled so long and hard for the implementation of bilingual education programs in schools throughout the country. They have found great value in the acquisition of English fluency, but are unwilling to see their children fall behind their peers academically during the period of transition from one language to another. Neither are they willing to allow the denigration of their cultural heritage in the process.

However adults have fared in the U.S. in this nation's alternating war and romance with bilingualism and pluralism in the past generation, children in need of language assistance in school have until recently been assured of getting it as a matter of national policy.

Even those who have questioned certain forms of bilingual education have sought aid for those youngsters. For example, the National Education Association has objected to the Reagan Administration's limitation of funds under $100 million for bilingual education,[14] and the NEA has proposed that federal legislation[15] favoring total immersion in English be abandoned.

Bilingual education for limited English proficient children has been accepted as part of the standard public school curriculum, since the federal Bilingual Education Act was passed in 1968, and the U.S. Supreme Court ruled in 1974 that "those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful."[16]

But to limit bilingual education to those children who do not understand English or even those "dominant" in another language or dialect has been found wanting by linguists and educators.[17] For example, children in the

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[14] "Reagan is Urged to Drop Support of Bilingual Bill," III Education Week 3 (September 28, 1983).

[15] H.R. 2682 (98th Cong. 1st Sess. 1983).

[16] Lau v. Nichols, 414 U.S. 563 (1974).

[17] See, generally, National Puerto Rican Task Force on Education Policy, "Toward A Language Policy for Puerto Ricans in the U.S.", Bilingual Edition, 1982; Attinasi, J., et al., "Intergenerational Perspectives on Bilingualism", Center for Puerto Rican Studies, 1982.

United States living in Spanish-speaking environments seem to suffer academically, even if they are dominant in English, yet language rarely is taken into account when these minors do poorly.

When the Aspira lawsuit was filed in New York in 1972 to require the City school system to provide bilingual education, the problem these children would face was known. But at the time it was not considered politically feasible to demand that children be given whatever language assistance and educational support was needed to allow them to maintain pace with children who speak the language and manifest the culture dominant in the United States.[18]

This larger group of English-speaking children from home environments where languages and dialects other than standard English is used, slowly has been gaining some recognition at law. Educators and courts now are being asked to lower the language barriers these youngsters may face. Courts reluctantly are beginning to recognize the language barrier between school systems geared toward that dominant language and culture, and all others, including blacks from lower socio-economic status who come from Black English dialect environments.[19]

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[18] See, Santiago-Santiago, Isaura: "A Community's Struggle for Equal Educational Opportunity: ASPIRA v. Bd. of Ed.", Office of Minority Education, ETS, 1978.

[19] See, e.g. Martin Luther King Elmentary School Children v. Ann Arbor School District, 473 F.Supp. 1371 (E.D.Mich. 1979)

Especially when learning to read and write in early elementary school, children in environments significantly different from that of the public school they attend often exhibit difficulty in shifting from the linguistic cultural "codes" of the home to that of the classroom.[20] Ideally, then, public school administrators should learn, as a few have,[21] to take appropriate action to overcome language barriers faced by children not of the dominant language and culture. Federal legislation requires that much.

To the degree that the law is followed, bilingual or multilingual schools might become increasingly common in certain neighborhoods. Thus the language or "code" the child uses will be taken into account as the school systems endeavor to aid all of the youngsters in the schools to adapt to the dominant language and culture of the United States without causing them to lose identity or self-esteem.

In a school system cognizant of such linguistic and cultural variables, no child would have to forsake his or her home environment to reap the benefits of public schooling. This would be of particular importance to children, including Puerto Ricans, who tend to go back and

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[20] The code switching problems and the Spectrum of "language and dialect" perhaps is best discussed by the aforementioned National Puerto Rican Task Force. See, note 13.

[21] See, e.g. "Spanish-as-a-Second Language, What Some Holyoke Students Have to Say" IV A Chronicle: Equal Education in Massachusetts I (May, 1983).

forth, throughout the period of required school attendance, between school systems where English is the dominant language and those on the Island, where Spanish prevails.

Puerto Rican youngsters would not be the sole beneficiaries. Certainly Native Americans and Eskimos in Alaska face similar problems. It is likely that blacks, especially the poor among them, also experience the kinds of difficulties resulting from language and culture if and when they move back and forth between schools that remain segregated and those in which they are minority.[22]

Schools then would be designed to be integrated, not only along racial lines but those of language and culture. Any move in such direction would be desirable for those who do not understand English and also for those whose home environments in the United States are different than the standard model. Certainly any child from a Spanish-speaking environment could not be harmed by a new awareness of how learning of varying "codes" impacts on a child's educational progress.

Ideally, children with language and cultural difficulties would not be labeled as "problem youngsters" in need of special education.

Despite this progress in the movement for bilingualism in United States schools, this does not automatically

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[22] This issue and a legal case brought by the Fund in Bridgeport, Connecticut affecting Puerto Ricans, blacks and whites was discussed in E.Fiske, "Language Gap Debated Anew," New York Times, C1, Dec. 7, 1982.

translate into a right to a bilingual education. The Supreme Court in Lau did not prescribe any given educational methodology to achieve an equal educational opportunity. The national mood, which before the Reagan Administration at most tolerated bilingual education as a pedagogical tool, has since become less forebearing. The current Administration's proposed amendments to the Bilingual Education Act would vitiate it of its original intent and purpose.[23] The Report of the Twentieth Century Fund Task Force on Federal and Secondary Education Policy[24] recommends an end to federal support for bilignual education.[25]

If this reflects the status of the struggle for bilingualism in the area where traditionally there has been most tolerance for such a concept, we should not be surprised to learn that there have been few major advances made in the last few years. In fact, rejection of the public use of languages other than English is almost becoming a badge of patriotism.

Legislative enactments, agency rules, and court decisions have in the past not only countenanced, but required the official use of languages other than English, but this movement may be stagnating.

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23 See, March, 1983 NABE News analysis of the proposed amendments and their impact.

24 See, June, 1983 NABE News response to the Twentieth Century Fund's report.

25 It is unclear that the 20th Century Fund in fact endorses this position. Its President, Robert Wood, is said to have disclaimed it in a public forum.

NATIVE LANGUAGE ASSISTANCE

If Puerto Ricans and other Hispanics are going to get the public services and language assistance they need, they likely will have to use their voting franchise. Thus, access to the election process becomes critical in order for Hispanics to have a voice in public affairs.

A provision of the Voting Rights Act of 1965 protected the right to vote of Puerto Ricans unable to read, write, or interpret certain provisions in English. The federal law was and is as follows:

> (1) Congress hereby declares that to secure the rights under the 14th Amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand or interpret any matter in the English language.
>
> (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in...the Commonwealth of Puerto Rico in which the predominant classroom language was other than English shall be denied the right to vote in any Federal, State or local election because of his inability to read, write, understand or interpret any matter in the English language...[26]

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[26] 42 U.S.C. §1973b(e)(1),(2); Voting Rights Act of 1965, Sections 1 et seq., 4(e)(1),(2).

In Katzenbach v. Morgan[27] the Supreme Court of the United States upheld this provision of the Voting Rights Act against a challenge by the State of New York. The Court struck down a requirement that Puerto Ricans pass a test of English literacy in order to have the right to vote in New York, stating that:

> section 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York non-discriminatory treatment by government--both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing, and law enforcement.
>
> Section 4(e) may be readily seen as "plainly adapted" to furthering these aims of the Equal Protection Clause. The practical effect of Section 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is "preservative of all rights." [Citation omitted.] This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and the equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement.[28]

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[27] See, footnote 4, above.

[28] 384 U.S. at 652-653.

Section 4(e) was a definite advance. But though the use of English literacy tests was forbidden, Puerto Ricans in New York were still being stymied in gaining access to electoral politics, because the registration and voting processes were still conducted exclusively in English.

So in 1972 the Puerto Rican Legal Defense and Education Fund joined in representing plaintiffs in the case of Puerto Rican Organization for Political Action (PROPA) v. Kusper,[29] where the Seventh Circuit Court of Appeals upheld a decision ordering Spanish translations of certain election materials in Chicago. The court declared that under federal law the right to vote means the right to an effective vote, and that a monolingual Spanish speaker could not cast an effective vote when faced with election materials he or she could not understand. Other lawsuits followed in which courts ordered bilingual elections: Torres v. Sachs,[30] (New York); Arroyo v. Tucker,[31] (Philadelphia); Ortiz v. New York State Board of Elections,[32] (Buffalo), and Márquez v. Falcey,[33] (New

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29 See, footnote 7, above.

30 381 F.Supp. 309 (S.D.N.Y. 1974).

31 372 F. Supp. 764 (E.D.Pa. 1974).

32 Civ. No. 74-455 (W.D.N.Y., Oct. 11, 1974).

33 Civ. No. 1447 (D.N.J., Oct. 1, 1973).

Jersey). Together with the PROPA case, these were the legal underpinnings for the bilingual election provisions contained in Section 203 of Title II and Section 301 of Title III of the 1975 Voting Rights Amendments.

The legislative history of the Voting Rights Act of 1975, specifically the U.S. Senate Report, acknowledges its debt of gratitude to these decisions:

> The Morgan case has enormous significance for the bill now before us. The Court approved the exercise of congressional power to enfranchise language minorities who are being denied the right to vote because of their inability to read or understand English. In that instance, Congress suspended the New York State statue requiring ability to understand English as a prerequisite for voting as it is applied to Puerto Rican residents. Later litigation under that section held that New York must provide bilingual election materials, as well as allows Spanish-speaking Puerto Ricans to vote.[34]

The right to native language assistance becomes even more critical in those instances where the State seeks to deprive an individual of life or liberty. In United States ex rel. Negrón v. State of New York [35] the United States Court of Appeals for the Second Circuit declared that:

> [T]he least we can require is that a court, put on notice of a defendant's severe language difficulty, make unmis-

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[34] "Voting Rights Act of 1962-Extension", 2 U.S. Code, Cong. & Adm. News 774, et seq. (94th Cong., 1st Sess. 1975), at 803.

[35] 434 F.2d 386 (2nd Cir. 1970).

> takenly clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial.[36]

The right of criminal defendants to native-language assistance is based on the United States Constitution's Sixth Amendment guarantee of a right to be confronted with adverse witnesses, including the right to effectively cross-examine those witnesses, and on the additional Sixth Amendment right to the assistance of counsel. The rights of non-English-speaking voters, however, are given by statute, and can be withdrawn by legislative action. This is an important distinction. Legislators are selected through a political process very sensitive to such variables as public opinion and special interest groups.

In the past, courts have held that the use of Spanish in official government dealings with Hispanics was required in many instances. For example: Pabón v. Levine[37] (the New York State Department of Labor required to provide bilingual services for unemployment compensation applicants); Mendoza v. Levine [38] (New York City and State must provide bilingual services and assistance to

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[36] 434 F.2d at 391.

[37] 70 F.R.D. 674 (S.D.N.Y. 1976).

[38] 412 F.Supp. 1105 (S.D.N.Y. 1976).

Hispanic welfare applicants and recipients); Sánchez v. Maher [39] (bilingual forms, notices, and personnel required for Hispanics who seek and receive welfare benefits in Connecticut); and there are other cases.

But a recent opinion by the influential Second Circuit Court of Appeals here in New York City has raised a formidable obstacle to advocates for bilingualism. Soberal-Pérez v. Heckler[40] was an appeal by Hispanics with limited abilities in the English language, who had been denied their claims for social security and/or supplemental security income. They alleged in the district court that the denials were due to the failure by the Department to provide notices and oral instructions in Spanish. The plaintiffs had all received notices of denial of their claims in English. Because of their inability to understand these notices and the oral instructions given at the social security office, they had waived their right to a hearing, or failed to file timely appeals.

Citing precedent in the Sixth[41] and Ninth[42] Circuit

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[39] _____ (D.Conn. ____).

[40] Docket No. 82-6340, decided August 30, 1983.

[41] Frontera v. Sindell, 552 F.2d 1215, 1219-20 (6th Cir. 1975).

[42] Carmona v. Sheffield, 475 F.2d 738,739 (9th Cir. 1973.

Courts of Appeals, the Second Circuit rejected the notion that Spanish language is an integral part of Latinos's national origins. "Language, by itself, does not identify members of a suspect class."[43] Hispanics, as an ethnic group, the court acknowledged, constitute a "suspect class" for purposes of Equal Protection Clause analysis.

> Where governmental action disadvantages a suspect class...the conduct must be strictly scrutinized and will be upheld only if the government can establish a compelling justification for the action. Where a suspect class...is not implicated, the challenged action need only be rationally related to a legitimate governmental purpose.[44]

The court then went on to state what it considered such a "legitimate governmental purpose":

> It is not difficult for us to understand why the Secretary decided that forms should be printed and oral instructions given in the English language: English is the national language of the United States.[45]

While the court parenthetically nods at the fact that the three plaintiffs, who were Puerto Rican, did not have to be fluent in English, and cites Arroyo v. Tucker,[46] those particular circumstances creating special consideration for

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[43] Soberal-Pérez, No. 82-6340, slip op. at 6137. But cf., EEOC Guidelines, below at page 29, ("The primary language of an individual is often an essential national origin characteristic.")

[44] Id., slip op. at 6136-37 (citations ommitted).

[45] Id., slip op. at 6138-39 (emphasis added).

[46] See, footnote 22, above.

Puerto Ricans (including the fact that "the United States has encouraged Puerto Rico to teach school children in Spanish"[47]), were not even considered.

With regard to the Due Process claim raised by the plaintiffs, the Second Circuit held that:

> Notice in the English language to social security claimants residing in the United States is "reasonably calculated" to apprise individuals of the proceedings.[48]

After Soberal-Pérez it is less likely that courts would require Spanish language assistance in cases such as Pabón, Mendoza, and Sánchez.[49]

USE OF SPANISH AT THE WORKPLACE

Requiring the use of Spanish in public life, however, is not the only goal of a language policy that would foster tolerance of a language other than English in this society. It is important to have the use of other languages permitted elsewhere, especially in the work place.

In employment, language use should be viewed against a background of respect shown generally for a given ethnic or

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47 372 F. Supp. at 766.

48 Soberal-Pérez, No. 82-6340, slip op. at 6141. Note the court's narrowing its holding to those residing in the country.

49 See, footnotes 28,29, and 30, above.

national group. The use of Spanish at the workplace poses a different question under the law: To what extent and under what circumstances is an employee entitled to speak Spanish on the job, free from adverse consequences?

Employment practices which impinge upon the rights of Hispanics are governed by a federal statute popularly known as Title VII of the Civil Rights Act of 1964. [50] Section 703(a)(1) of Title VII provides that it is an unlawful employment practice for an employer "to discriminate against any individual with respect to ... terms, conditions or privileges of employment because of such individual's ... national origin". Court interpretations of this act have set aside neutral employment practices where they disproportionately harm a protected group's ability to obtain or maintain employment and are not justified by a business necessity. For example, a height requirement used as a basis for hiring was set aside in Los Angeles as being unrelated to the job of firefighters, when it disproportionately excluded a large number of Mexican-Americans [51].

In the absence of this anti-discrimination law many of the rights and privileges that employees have are dictated by the employer. In general terms, therefore, unless

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[50] 42 U.S.C. §2000e et seq.

[51] Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977).

civil rights or labor law is implicated employers are often free to impose any rules they desire.

Many employers have imposed "English-only" rules varying from prohibiting the use of other languages at certain specific times of the work day to absolute prohibitions at all times while on the job. Hispanics are usually the affected group. All of the reported decisions in this area have been brought by Hispanic workers and Hispanic civil rights organizations. A review of this case law reveals that by far the challenges have been successful, with only a handful of cases surviving the charge that the English-only rules unlawfully discriminated against Spanish-speaking workers.

Legal challenges to English-only rules[52] have been successful and have established the following general principles:

a) Absolute Prohibitions: Blanket prohibitions on speaking any language other than English at all times at the workplace are categorically illegal.[53]

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[52] Six opinions were rendered, two of which were decisions of the federal courts, the remainder, administrative opinions of the EEOC: García v. Gloor, 618 F.2d 264 (5th Cir. 1980); Saucedo v. Brothers Well Service, 464 F. Supp. 919 (S.D.Tex. 1979); EEOC Dec. No. 73-0479 (Feb. 1973), CCH Employment Practices ¶6381; EEOC Dec. No. 72-0281 (Aug. 1971), CCH Employment Practices ¶6293; EEOC Dec. No. 71-446 (Nov. 1970), CCH Employment Practices ¶6173; EEOC Dec. AU7-2-88 (1967) (unreported).

[53] See, EEOC Decisions Nos. AU7-2-88 and 71-446, above.

b) Business Necessity: A speak-English-only rule might be justified by a valid business purpose for example, if the rule is necessary for the safe and efficient operation of the business.

Because of the potential for discrimination against Hispanics presented by English-only rules, a business necessity defense should be carefully analyzed to assure that it strictly addresses the business purpose proferred, while not unduly burdening Spanish-speaking workers. For example, there is some support for the proposition that customer preference cannot always provide an employer with a valid defense.[54]

In the administrative cases discussed above certain business purpose defenses were insufficient to support an English-only rule. The mere fact that speaking Spanish may appear disrespectful when non-Spanish speaking persons were present was held insufficient in one case.[55] In another case the defense that supervisors would not understand the workers' conversation in Spanish was also unsuccessful.[56]

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[54] See, Díaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971).

[55] EEOC Dec. 73-0479. An attempt to halt the use of Spanish when English-speaking patrons were present was also found insufficient to allow an English-only rule. EEOC Dec. 72-0281. This decision apparently went out on a limb and may not be decided the same way today. See, discussion of EEOC Guidelines, below.

[56] EEOC Dec. 71-446.

c) Instances Where English-Only Rules Are Permitted: Case law has allowed the imposition of English-only rules in limited circumstances. In Saucedo v. Brothers Well Service,[57] the court found that plaintiff Saucedo's discharge as an oil driller, for violating an English-only rule, was illegal. The court focused on matters which were later incorporated in the EEOC Guidelines: whether the policy established was consistently enforced; whether all employees had notice of the rule, and whether they were informed of the consequences of speaking Spanish in violation of the "rule". In all instances the court found that these matters were not settled.

Nevertheless the court noted that where the safety of the employees was at issue, an English-only rule could be enforced during the actual drilling of the oil well because of the necessity for cooperation and team work inherent in such an undertaking. In effect, the court was saying that safety may be a valid business purpose that would render an English-only rule necessary.

In García v. Gloor, [58] a federal court of appeals squarely addressed the propriety of English-only rules and made some startling observations regarding their legality. Language discrimination, the court stated, is not national origin discrimination; neither is discrimination based on

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[57] 464 F. Supp. 919 (S.D.Tex. 1979).

[58] 618 F.2d 264 (5th Cir. 1980).

any other ethnic or sociocultural trait. This statement was supported by the court's finding that the English-only rule could not discriminatorily harm the plaintiff because "the impact of the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference".[59] The decisive factor in the court's view was the fact that the plaintiff was bilingual:

> [I]f the employer engages a bilingual person that person is granted neither the right nor privilege by statute to use the language of his personal preference.[60]

The court went even further and stated that this English-only rule was valid even if it represented an arbitrary and unjustifiable business practice.

Fortunately, García v. Gloor does not represent the present state of the law in this area. In fact, it has been limited by the Equal Employment Opportunity Commission (EEOC), which is the federal agency charged with the enforcement of Title VII's guarantees. The court in García was clearly deciding the case without an EEOC "standard for testing such rules [or] any general policy, presented to be derived from the statute, prohibiting them."[61] As a result, all future challenges to these rules can rely on the guidelines promulgated by the agency.

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[59] 618 F.2d 264, 270 (5th Cir. 1980).

[60] Id. at 269.

[61] 618 F.2d 264, 268, n.1.

The EEOC often promulgates regulations that have the force of law. The EEOC has enacted Guidelines on Discrimination Because of National Origin which state in pertinent part, as follows:

> A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII [of the Civil Rights Act of 1964] and will closely scrutinize it.[62]

Recognition of language as an "essential national origin characteristic" is the critical element in the EEOC's approach. Unless language is equated with national origin an allegation that an English-only rule violates Title VII cannot be successful. Nevertheless the regulation poses additional problems of definition. As stated above the prohibition which is suspect is that which is directed at the employee's "primary" language or the language spoken "most comfortably". While never tested in court these

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[62] 29 C.F.R. §1606.7.

standards may lead to disparate results depending on whether the plaintiff is comfortable in either Spanish or English or both.

As noted above, these Guidelines legally recognize that language is often an essential national origin characteristic, contrary to the García case.[63] Furthermore, the regulations establish the following standards:

> (a) An English-only rule applied at all times in the workplace will be closely scrutinized and is presumptively illegal.
>
> (b) An English-only rule applied only at certain times in the workplace will only be tolerated if justified by business necessity.
>
> (c) Employers should notify all workers of the applicability of a limited English-only rule and of the consequences of violating such a rule.
>
> (d) Finally, the EEOC, in its preamble to the Guidelines, [64] recognized only two

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[63] Cf., Soberal-Pérez, footnote 31, above, and text.

[64] 45 C.R.85635 (Dec. 29, 1980).

possible business purposes for implementing such a rule: "where safety requires that all communications be in English so that everyone can closely follow a particular task, such as, surgery or drilling of oil wells; or where a salesperson is attending to English-speaking customers."

Under these standards, the García case may well have been decided differently.

After the García decision and the EEOC's Guidelines, several cases were reported in this area, two of which received widespread publicity. These cases define the present legality of these employment practices:

Administrative Decisions: Two decisions were rendered by the EEOC after the promulgation of the EEOC Guidelines.[65] The first decision struck down an absolute prohibition on speaking languages other than English in a tailor shop. Despite allegations that customers complained when they heard co-workers speaking Spanish, the EEOC decided that other solutions were available and no business necessity was shown to save the policy.[66]

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[65] EEOC Dec. No. 81-25 (July, 1981), 27 FEP Cases 1820; EEOC Dec. No. 83-7 (April 1983), 31 FEP Cases 1861.

[66] The policy was evidenced by a notice which told employees "when you are on the payroll all conversations will be in English. Either work and speak English or work and don't talk."

The second decision was an unsuccessful challenge to a carefully tailored English-only rule at a petroleum company's refinery and laboratory work sites. The English-only rule was applicable to refinery personnel only during emergencies and to those refinery workers in the laboratory and processing areas, only when they were performing their job duties. The employer successfully defended this rule as necessary for the safe and efficient operation of the business.

Both of these decisions are consistent with the EEOC Guidelines. The latter decision (No.83-7) presents a favorable limitation on the application of such a rule to workers only "while performing job duties".

EEOC Charges: In two separate cases EEOC charges were filed in 1983 challenging English-only rules. Neither case has resulted in an opinion.

The first case [67] resulted in a successful and publicized settlement for three Hispanic women. These women were fired two days after the following order was given by their supervisors:

> From this day forward ENGLISH only is spoken in this office. When you speak in your own language the rest of the crew here knows you are speaking about one of them or me. So in all fairness to your co-workers speak English only.

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[67] Lavine, Berroa & Puente v. National Restaurants, Inc., EEOC Charge Nos. 021-83-2062, -2063, and -2064.

The workers were figure clerks. They tallied meal checks and verified the totals shown. Their job duties did not include any contact with the public. Charges were dropped after a successful settlement was reached which awarded the women their positions with no loss in benefits, back pay and most importantly, a recission of the English-only policy.

The second case is a pending challenge to an English-only rule presently in force against all municipal employees in Elizabeth, New Jersey.[68] Unlike previous cases the employer in this case has not taken any adverse action against employees for violating the rule which was incorporated in one of the Mayor's memoranda.[69] In fact, the City of Elizabeth, in response to the legal challenge, has nearly disavowed any intention of enforcing the rule.[70] Nevertheless, the memorandum has not been rescinded and allegations are made that affected employees are not complaining for fear of losing their jobs.

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[68] Puerto Rican Legal Defense and Education Fund v. City of Elizabeth, EEOC Charge No. 022-83-0844.

[69] The memorandum by Mayor Thomas G. Dunn, dated June 16, 1983, stated, in part:

> May I add further that English is the primary language to be spoken in the official conduct of City business. Other languages should be used only when helpful to citizens or visitors who are handicapped because of a language barrier. Furthermore, it is most discourteous for City employees to converse in other than English in front of other City employees.

[70] Position Paper by Frank Trocino, City Attorney of Elizabeth, Aug. 23, 1983.

Both of these recent cases present English-only rules that are decisively illegal under Title VII and the EEOC Guidelines. All indications in the case law are that these absolute prohibitions are illegal and that the "discourtesy" or the "unfairness" of speaking another language in the presence of co-workers does not provide an adequate business necessity. If these reasons are the only justification that the City of Elizabeth will offer, their English-only policy should not survive a challenge.

The case of Elizabeth, New Jersey illustrates the prevailing trend in the national mood against bilingualism. Some are beginning to see this movement as a national crusade.

A group of ultra-conservatives spearheaded by S.I. Hayakawa recently founded a non-profit organization whose purpose is to promote a constitutional amendment establishing English as the official language. It was then-Senator Hayakawa who last year introduced an amendment to the Simpson-Mazzoli Bill that states:

> It is the sense of the Congress that -- (1) the English language is the official language of the United States, (2) no language other than the English language is recognized as the official language of the United States.

Fortunately, this English-only movement has not gone unchallenged. Walter J. Landry, in a Chairman's Report of the U.S. Language Policy Conference held in Chicago in January of this year, included the text of a Proposed U.S. Language Policy Statement adopted by the conferees, which declares in its preamble that:

> In our pluralistic society, it is imperative that we understand, accept and appreciate each other. This requires culturally sensitive and meaningful communication in more than one language. Cross-cultural sensitivity and multilingual competency is even more critical in an increasingly interdependent world.
>
> Therefore, it is in the best interest of the United States to adopt a public policy which preserves, protects and promotes our vast wealth of languages and cultures.[71]

In his Chairman's Report Mr. Landry indicates that a National Caucus of U.S. Ethnic Language Organizations that have endorsed the Statement "will gather in Manchester, New Hampshire in the fall to seek the support of U.S. Presidential Candidates running in the New Hampshire Primary."[72]

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[71] Preamble to the "Proposed U.S. Language Policy Statement", attached to Chairman's Report from Walter J. Landry, dated January 25, 1983. ("Chairman's Report").

[72] Chairman's Report, page 2.

Some of the same sentiments incorporated in the U.S. Language Policy Statement seem to be echoed in the New York State Board of Regents' "Education for a Global Perspective" plan, which envisions a multi-lingual society by the end of this century, through a high school graduation requirement that students demonstrate some level of understanding of a language other than English.

The United States Congress has also been active in this area. There are a number of bills pending before both houses and in different stages of the legislative process, that impact directly on what we have been discussing. Some of them are:

> H.R. 2708, introduced on April 21, 1983, and referred to the Committee on Education and Labor, "To further the national security and improve the economy of the United States by providing grants for the improvement of proficiency in critical languages, for the improvement of elementary and secondary foreign language instruction, and for per capita grants to reimburse institutions of higher learning to promote the growth and improve the quality of post secondary foreign language instruction". Query: is Spanish a "critical language"?

S.1285, a bill reported on May 16, 1983 from the Committee on Labor and Human Resources, "To improve the quality of mathematics and science, computer education, foreign languages, and vocational education, and for other purposes."

CONCLUSION

The United States does not have an "official" language policy. That is to say, this country has yet to articulate an over-all, coherent national policy encompassing the rights of language minorities. There is a growing perception, particularly among Hispanics, of the existing policy vacuum, and the urgent need to structure such a policy. In its absence, employers in the private sector, municipal governments and state agencies in the public sector, have been and continue to be free to design a patchwork of disjointed and sometimes conflicting policies. It is time to bring this state of affairs to an end. Hispanics are called upon to be at the forefront of this initiative.

Because of the American citizenship conferred on all those born in Puerto Rico, and the fact that Spanish is the Island's language, Puerto Ricans may become the vanguard of this struggle.

In the past, there have been some important advances made: the bilingual provision of the Voting Rights Act; bilingual education; some requirements for bilingual notices and assistance; some limitation on an employer's right to establish and enforce English-only rules on the job. But these, for the most part, are rights created by statute or

agency rules. They do not, by any means, stand on a secure foundation. The foundation, in fact, shows weaknesses, and may crumble unless those opposed to bilingualism are engaged in debate, and defeated in the arena of public opinion and political contest. In this regard, a discussion between Canadians and Americans, encompassing French in Quebec and Spanish in Puerto Rico, and the use of those languages in the rest of North America, could prove very useful.[73]

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[73] See, generally, Language and Society, Num. 10, Summer, 1983 (Special Issue), Commissioner of Official Languages, Canada.